COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. — 73-805

RONALD COPPOLA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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Prayer

The petitioner, Ronald Coppola, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals, Tenth Circuit.

Opinion Below

The opinion of the United States Court of Appeals, Tenth Circuit, United States of America vs. Ronald Coppola, Number 73-1170, filed October 25, 1973, appears in the Appendix hereto.

Jurisdiction

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on October 25, 1973. A timely Petition for Rehearing was denied on November 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Did the Trial Court's Instruction to the jury, that the Government must establish each of the three essential elements of the offense charged by a "preponderance of the evidence" (rather than "beyond a reasonable doubt"), deprive the petitioner of a fair trial by an impartial jury, and due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

(2) Did the Trial Court's ruling that appellant may be prosecuted as an "aider and abettor" within the judicial district of Oklahoma violate basic laws of jurisdiction and venue, and deprive petitioner of a fair trial by an impartial jury within the proper judicial district, and due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

(3) Did the admission into evidence in the jury's presence of the "in-court" eyewitness identification, tainted by improper pretrial law enforcement identification procedures deprive the petitioner of the effective assistance of counsel, a fair trial by an impartial jury, and due process of law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

(4) Did the Trial Court's (A) refusal to grant petitioner's attorney a reasonable continuance of the trial date, and (B) failure to give an instruction concerning the Government's burden of proof on the issue of identity, amount

to an abuse of judicial discretion under the circumstances, and deprive petitioner of his right to the effective assistance of counsel, a fair trial by an impartial jury, and due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

Statement of the Case

Petitioner, Ronald Coppola, was indicted on September 15, 1972 by the United States Grand Jury in Oklahoma City, Oklahoma for a violation of Title 18 U.S.C. §2314, which indictment reads as follows:

> "On or about the 26th day of November 1971, at Norman, Cleveland County, Oklahoma, in the Western Judicial District of Oklahoma,
> . . . . .LOUIS SALVATORE BACCARI and RONALD COPPOLA. . . . .having devised a scheme to defraud, such scheme being to procure sale and delivery to them of horses in exchange for worthless checks, induced James M. Mathis to travel in interstate commerce from Norman, Oklahoma to Providence, Rhode Island, in the execution of such scheme to defraud the said James M. Mathis of horses having a value in excess of $5,000.00, in violation of Title 18, United States Code, Section 2314."

Co-defendant, Louis Baccari pleaded guilty in the United States District Court for the District of Rhode Island and was sentenced to a term of three years imprisonment. Subsequently, on December 14, 1972, petitioner's trial counsel moved for a reasonable continuance on the grounds that he had only been retained several days prior to the trial and needed additional time to prepare due to the lapse of one year from the date of the commission of the offense,

and that, in addition to being unable to locate several necessary witnesses, certain others who had been located were temporarily unavailable due to illness (Tr. 8-12). The motion was denied by the Court. On this same date, December 14, 1972 the petitioner's trial by jury commenced in the United States District Court in Oklahoma City, Oklahoma and on December 15, 1972, petitioner was found guilty. Following the denial of petitioner's motion for new trial, on January 26, 1973, petitioner received the maximum sentence of ten (10) years in Federal prison and to pay a fine of $10,000.00. Petitioner has paid said fine, but remains on bail pending this appeal.

During petitioner's trial, prosecution witness, *James M. Mathis* testified that he is the manager of the Pelham Ranch in Norman, Oklahoma, in the business of breeding, racing and selling registered quarterhorses (Tr. 62); that while in Oklahoma he received several telephone calls from co-defendant, Louis Baccari, calling from Rhode Island (Tr. 111); that during said telephone conversations he and Baccari discussed the selling of several quarterhorses to Baccari (Tr. 109); that pursuant to these telephone conversations, Mathis testified that he and one David Ashford, hauling several quarterhorses in a truck, traveled from Norman, Oklahoma to Providence, Rhode Island, arriving in Rhode Island on Sunday, November 28, 1971, where they then met with co-defendant Baccari and the petitioner, Ronald Coppola at an outside wooded area (Tr. 62); that they had never seen or had any contact whatsoever with petitioner, Ronald Coppola, prior to this first meeting in Rhode Island (Tr. 62); that petitioner, Ronald Coppola, was introduced to them by Baccari as "Ray Cianci," a prospective buyer of horses (Tr. 63); that after unloading the horses from the truck, Mathis and Ashford brushed them, put halters on them and then walked them around for the prospective buyers (Tr. 69); that Mathis and Baccari were

"haggling" over the selling price of the horses, and during a part of this time petitioner, Ronald Coppola, was about ten (10) yards away (Tr. 74); that it was snowing and approaching dark (Tr. 319), and they were at this area between forty (40) minutes to an hour (Tr. 319); that they finally agreed on a selling price of $10,500.00 for the horses, and that he saw petitioner, Ronald Coppola, write this amount on a 'check' in his presence, and give the 'check' to him for the horses; that the horses were left in Rhode Island and Mathis and Ashford returned to Oklahoma with the $10,500.00 'check', which they first discovered was worthless after their arrival back in Oklahoma; that almost one year later, in August or September 1972, in Oklahoma City, he picked out petitioner's photo from several others, (Tr. 78). Prosecution witness, *David Ashford* testified that petitioner Ronald Coppola's photo was the only photo that had the words "Rhode Island" under the face photograph (Tr. 329). Mathis also testified that approximately two months later, in November 1972, he picked petitioner, Ronald Coppola, out of a lineup in Oklahoma City, as the individual "Ray Cianci" he last observed in Rhode Island in November 1971. Co-defendant, *Louis Baccari* testified as a defense witness that he did, in fact, make telephone calls from Rhode Island to Mathis in Oklahoma in November 1971, and that he did meet with Mathis and Ashford in Rhode Island on Sunday, November 28, 1971 (Tr. 202), but that, however, the petitioner, Ronald Coppola, was not the person with him at this meeting; that this was a case of mistaken identification by Mathis and Ashford, and that the person who was with him at this meeting was one Ralph Zanfagna, and not the petitioner, Ronald Coppola (Tr. 203); that it was, in fact, Ralph Zanfagna whom Baccari introduced as "Ray Cianci" to Mathis and Ashford, and it was Ralph Zanfagna, and not the petitioner,

Ronald Coppola, who wrote out and then gave the worthless $10,500.00 'check' to Mathis (Tr. 203).

Ralph Zanfagna also testified as a defense witness that it was he, and not the petitioner, Ronald Coppola, who was introduced as "Ray Cianci" and who wrote and then gave the worthless $10,500.00 'check' to Mathis for the horses (Tr. 180, 199).

Several other witnesses testified either for the Government or the defense, including *Albin Wayne,* a defense handwriting expert, who stated that in his expert opinion the writing on the $10,500.00 'check' was written by Ralph Zanfagna and not the petitioner, Ronald Coppola (Tr. 258). Prosecution witness, *Clarence W. Brittain,* a handwriting expert for the Federal Bureau of Investigation, testified that he could not state whether it was, in fact, Ralph Zanfagna or the petitioner, Ronald Coppola, who wrote the writing on the $10,500.00 worthless 'check' because in his opinion the handwriting sample was "too limited" (Tr. 284, 286).

Reasons for Granting the Writ

Petitioner respectfully contends that based upon the following facts and the applicable law the writ of certiorari should issue in order that there be a clarification in the law in this regard.

(A) With respect to petitioner's "Issue Presented Number One", during the final charge to the jury, the Trial Court stated (Tr. 404):

> "There are THREE ESSENTIAL ELEMENTS OF THE OFFENSE charged herein, each of which the GOVERNMENT MUST ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE. THESE THREE ESSENTIAL ELEMENTS ARE:

(1) The defendant on trial devised a scheme to defraud or for obtaining property from James M. Mathis by means of false or fraudulent pretenses, representations or promises.
(2) That such scheme involved property having a value of $5,000.00 or more.
(3) That pursuant to such scheme, the defendant on trial induced James M. Mathis to travel in interstate commerce from Oklahoma to Rhode Island in execution of such scheme against the said James M. Mathis." (Emphasis added)

Following the giving of the instructions orally, the written instructions were then sent into the jury room by the Trial Court, so that the written instructions could be referred to and studied by the jurors during their deliberations (Tr. 412). Although the Trial Court did orally make passing references to the words "reasonable doubt" on several occasions during the instructions, the above quoted instruction stating that the prosecution's burden of proof of the three essential elements was by a mere 'preponderance of the evidence' was the only instruction wherein the three essential elements of the offense were specifically spelled out and explicitly set forth. Petitioner respectfully alleges therefore, that this one instruction was perhaps the most damaging and prejudicial instruction of all, since it would, almost of necessity, be the first instruction the jurors would turn to, study, digest, and then compare the three essential elements of the offense, as specifically and explicitly set forth in this one instruction, with the factual evidence presented during the trial, in order to render their verdict in this case. Petitioner respectfully contends that this erroneous instruction, in one sweeping gesture, struck down the entire foundational structure upon which every criminal trial is based, the time honored rule that when

life and liberty, as opposed to mere property are at stake, the tremendous burden carried by the Government has always required that each and every element of the offense charged by proven 'beyond a reasonable doubt', rather than by a mere 'preponderance of the evidence' as in civil cases.

(B) With respect to petitioner's "Issue Presented Number Two", in its opinion, the Circuit Court of Appeals ruled that the Federal Statute, Title 18 U.S.C. §3237(a) is applicable and controlling in this case, and that it provides the proper jurisdiction and venue for the trial to be held in the Oklahoma, rather than the Rhode Island Judicial District. This statute in its pertinent portions reads as follows:

> "Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

Petitioner respectfully contends that in its opinion the Circuit Court of Appeals has applied Title 18 U.S.C. §3237 (a) to a situation wherein it has no application. This statute, petitioner respectfully alleges, is applicable only to those offenses which are truly "continuing offenses" in nature, such as Dyer Act violations, and the interstate transportation of contraband or stolen property, as examples.

However, in the instant case of petitioner, an analysis of the wording of the indictment indicates that it is the "INDUCEMENT" which is the key element of this offense. That is, that Baccari by phone calls made entirely within the State of Rhode Island to Mathis in Oklahoma "IN-

DUCED" Mathis to travel from Oklahoma to Rhode Island. This does not involve, for example, a "continuous offense" larceny situation, such as the interstate transportation of a stolen vehicle or stolen property, wherein an offense is actually being committed in each state through which the stolen property is transported. In the instant case, the crime was committed when Baccari, the principal, by phone calls made entirely within the State of Rhode Island, INDUCED Mathis to travel from Oklahoma to Rhode Island, Mathis is not (a) a criminal defendant, nor were the horses he transported (b) contraband or (c) stolen property, nor (d) was his travel through each state a crime. And, obviously, the required elements of the acts and criminal intent of Baccari in committing this crime by INDUCING Mathis to so travel, were all committed by Baccari, the principal, entirely within the State of Rhode Island. And, of course there was no evidence whatsoever that the petitioner, Ronald Coppola, the 'aider and abettor,' had at any time traveled to Oklahoma, been in Oklahoma, been anywhere outside the State of Rhode Island, or committed any acts or offenses within the Oklahoma Judicial District. Therefore, petitioner respectfully contends, the proper venue and jurisdiction for the trial of petitioner's case was Rhode Island and not Oklahoma.

(C) With respect to Petitioner's "Issue Presented Number Three", petitioner respectfully contends that the Circuit Court of Appeals has erroneously ruled as to whether or not pre-trial law enforcement identification procedures employed in this case were sufficiently improper as to taint the "in-court" eyewitness identification and render the latter inadmissible into evidence at the trial. Petitioner respectfully alleges that the opinion of the Circuit Court of Appeals contains several erroneous statements of fact on important matters which were major contentions of peti-

tioner on this issue. These relate to the opportunity of Mathis and Ashford to observe the person who was with Baccari on the day of the offense, the person who was introduced by Baccari as "Ray Cianci." As indicated in the foregoing "Statement of the Case" in this Petition, for the most part the attention of Mathis and Ashford was concentrated on unloading, grooming and parading their horses in their attempt to make this sale, rather than concentrating on "Ray Cianci". And the entire incident occurred in an outside wooded area in November in New England when it was snowing and approaching dark. Furthermore, unlike the victims of a crime such as an armed robbery who have an incentive to study the facial and other identifying characteristics of the robbers, Mathis and Ashford were completely unaware during the actual commission of the offense that they were the victims of any fraud. In addition, petitioner respectfully contends that the opinion of the Circuit Court of Appeals is in error in stating that the "photo spread was lacking in the slightest hint of suggestibility," since of the photographs shown to Mathis and Ashford in Oklahoma for identification purposes, only one photograph, that of the petitioner Ronald Coppola, had the words "Rhode Island" under the photograph. And (a) neither Mathis nor Ashford had ever seen the petitioner prior to the date they claim they first saw him at the time of the commission of the offense in November 1971, (b) neither saw the petitioner again until the photographs were shown in Oklahoma City almost a year later, and (c) the lineup occurred only two months following the showing of the photographs.

(D) With respect to Petitioner's "Question Presented Number Four," petitioner respectfully contends that the Circuit Court of Appeals in its opinion states facts for which

there is no basis in either the trial transcript or briefs on appeal.

Obviously, attorney John F. Cicilline was not petitioner's "trial" counsel "of his choice." Petitioner respectfully states that it is a well known common practice in many instances to have one attorney merely handle minor pre-trial matters, motions and hearings, etc., while another attorney is the one selected by the client to handle the most important stage of the proceeding, the trial itself. This is not only true in private defense practice. It is almost invariably the practice in the offices of the District Attorney, Attorney General and United States Attorney. Certain attorneys are permitted only to handle the minor pre-trial matters while the more experienced attorneys in the office conduct the actual trial. Under the circumstances of the instant case as set forth in the "Statement of the Case," a brief two week continuance in order that petitioner have "meaningful" representation by "trial" counsel "of his choice," "adequately prepared to defend", was not an unreasonable request. Contrary to the statement in the Court's opinion that attorney "Zaccagnino worked with Cicilline during the trial. . . . .", nowhere in the record, trial transcript, or briefs on appeal are there any facts or evidence that Mr. Zaccagnino "worked with" Mr. Cicilline, or that Mr. Cicilline participated in any manner during the trial other than to merely sit at counsel table. There is no evidence that Mr. Cicilline spoke one word during the trial by way of assistance or advice to Mr. Zaccagnino, nor that they "worked together" or collaborated in any manner, and certainly no evidence that Mr. Cicilline asked even one question of any witness or actively participated in any manner during the entire trial.

Conclusion

In order that there be a clarification in the law pertaining to the foregoing matters, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Tenth Circuit in petitioner's cause.

Respectfully submitted,

RONALD COPPOLA,

by his attorneys,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1170

September, 1973, Term

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
v.
RONALD COPPOLA,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(District Court No. CR-72-254)

Raymond J. Daniels, Providence, Rhode Island (*John F. Cicilline*, Providence, Rhode Island, and *Carroll Samara*, Oklahoma City, Oklahoma, on the brief) for Defendant-Appellant.
Jeff R. Laird, First Assistant U. S. Attorney (*William R. Burkett*, United States Attorney, on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before HILL and SETH, *Circuit Judges*, and SMITH,* *District Judge*.

HILL, *Circuit Judge*.

Ronald Coppola was indicted for executing a scheme to defraud James Mathis of horses having a value in excess of $5,000 in violation of 18 U.S.C. § 2314.[1] He subse-

* Honorable Talbot Smith, District of Michigan, sitting by designation.

[1] 18 U.S.C. § 2314. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

quently was convicted by a jury in the Western District of Oklahoma and sentenced to the maximum penalty allowed.

The record discloses that Mathis was the manager of a registered quarterhorse ranch near Norman, Oklahoma. In November, 1971, Louis Baccari induced Mathis through the use of interstate telephone calls to haul four quarterhorses from Norman to Providence, Rhode Island, for the express purpose of selling them. After hauling the horses to Providence, Mathis was introduced by Baccari to a man called "Ray Cianci", actually Coppola, who allegedly was the prospective buyer. After introductions, Mathis and Baccari proceeded to discuss a sale price and eventually agreed upon a price of $10,500 for three of the horses, Cianci then wrote out a countercheck for the agreed amount. After receiving the countercheck, Mathis left the three horses and returned to Oklahoma. Shortly thereafter he presented the countercheck for collection but was refused payment because no such account existed.

Mathis immediately notified authorities of the fraudulent scheme. Approximately a year later Baccari and Coppola were arrested and charged with inducing Mathis to use interstate commerce in the execution of a scheme to defraud Mathis of property having a value of over $5,000. Baccari pleaded guilty to this charge in the District of Rhode Island, and Coppola was found guilty in the Western District of Oklahoma of aiding and abetting[2] Baccari in the fraudulent scheme.

Coppola's first argument on appeal is that he was de-

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property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; . . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

[2] 18 U.S.C. § 2.

prived of a fair trial by an impartial jury when the trial court instructed the jury at one place in the instructions that the government must establish each of the three essential elements of the offense charged by a *preponderance of the evidence* rather than *beyond a reasonable doubt.* Coppola argues that charging a jury on preponderance of evidence is plain error because it leaves the jury with the impression that the government's burden of proof is less than beyond a reasonable doubt.

Coppola's trial counsel did not object to this questioned instruction at the time it was given, nor did he mention this error in his motion for a new trial. Failure to timely object would normally preclude objection on appeal. F. R. Crim. P., Rule 30 18 U.S.C. The one exception is when the improper instruction constitutes plain error because it seriously affects substantial rights of the accused. F. R. Crim. P., Rule 52(b), 18 U.S.C.; *United States* v. *Nelson,* 448 F.2d 1304 (10th Cir. 1971); *Wright* v. *United States,* 301 F.2d 412 (10th Cir. 1962).

Determining what constitutes plain error is no easy matter. As the United States Supreme Court has noted, defining plain or reversible error is an almost impossible task; it is something you know when you see it. *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964). One of the clearest definitions we have found on the subject states that plain error is "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *United States* v. *Summerour,* 279 F. Supp. 407, 410 (E. D. Mich. 1968).

In deciding whether the instructions constitute plain error we will review the instructions as a body rather than looking to one isolated sentence. *Russell* v. *United States,* 429 F.2d 237 (5th Cir. 1970); *Bynum* v. *United States,* 408 F.2d 1207 (D. C. Cir. 1968), *cert. denied,* 394 U.S. 935; *United States* v. *Summerour, supra.* In the court's charge,

time and again it was stated that presumption of innocence continues until such time as the guilt of the defendant is shown to the jury's satisfaction beyond a reasonable doubt.[3] Shortly after the allegedly prejudicial instruction was given, while still speaking on the same subject, the trial court stated: "You of course may not find any Defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the Defendant participated in its commission."

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[3] To the Indictment, the Defendant has entered a plea of not guilty, which casts upon the Government the burden of proving the essential allegations of the Indictment to your satisfaction beyond a reasonable doubt before you would be justified in returning a verdict of guilty as to the Defendant.

This presumption of innocence continues until such time as the guilt of the Defendant is shown to your satisfaction beyond a reasonable doubt, and if, upon a consideration of all the evidence, facts and circumstances in the case, you entertain a reasonable doubt of the guilt of the Defendant as to the crime charged against him, you must give him the benefit of that doubt and return a verdict of not guilty as to the Defendant.

A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

You are instructed that an intent to commit the crime set forth in the Indictment by the Defendant now on trial is an essential element of the crime charged, and the burden is upon the Government to establish such intent to your satisfaction beyond a reasonable doubt.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a Defendant, the jury be satisfied of the Defendant's guilt beyond a reasonable doubt from all the evidence in the case.

You of course may not find any Defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the Defendant participated in its commission.

If you find from the evidence in this case and under these instructions beyond a reasonable doubt that the Defendant on trial is guilty of the crime charged against him in this case then you should find the Defendant guilty.

This instruction, along with the other reasonable doubt instructions, sufficiently clarifies any ambiguity raised by the "preponderance of evidence" instruction. As the jury was charged that they must consider the instructions as a whole rather than relying only on parts of them, we are convinced the inadvertent instruction was harmless error. *United States* v. *Beyer*, 426 F.2d 773 (2d Cir. 1970); *see Scurry* v. *United States*, 347 F.2d 468 (D. C. Cir. 1965), *cert. denied*, 389 U.S. 883.

Appellant next asserts he was improperly indicted; that he was unable to prepare a proper defense because the indictment charged him solely as a principal although the prosecution proceeded and the court charged on the theory that he was an aider and abettor. This argument may be summarily refuted because the law does not require the aider and abettor statute to be specifically pleaded or that accused be charged with being an aider or abettor. *United States* v. *Adams*, 454 F.2d 1357 (7th Cir. 1972), *cert. denied*, 405 U.S. 1072; *United States* v. *Trollinger*, 415 F.2d 527 (5th Cir. 1969). As appellant has made no showing that his defense was hindered by the prosecution's aiding and abetting theory we find no grounds for reversal.

Appellant also suggests his case was improperly tried because the judicial district of Oklahoma lacks both jurisdiction and venue to hear this case. His position is that all acts of inducement causing Mathis to travel from Oklahoma to Rhode Island with the horses were perpetrated by Baccari while in the States of Rhode Island and New York, and as the acts of inducement were all performed outside Oklahoma, that judicial district lacks jurisdiction and venue to hear this case. We disagree, for under 18 U.S.C. § 3237(a)[4] it is clear that violation

[4] Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except

of § 2314 is a continuing offense which may be prosecuted in any district from which commerce moves. It necessarily follows that as the substantive crime was committed in Oklahoma, the crime for aiding and abetting may also be tried in that district. *United States* v. *Jackson*, —— F.2d —— (10th Cir. 1973); *United States* v. *Kilpatrick*, 458 F.2d 864 (7th Cir. 1972).

Appellant also charges error in admitting into evidence "in-court" eyewitness identifications because they were tainted by improper pretrial law enforcement identification procedures. When Mathis reached Providence, Rhode Island, late in the afternoon of a dreary November day, he was briefly introduced to a "Ray Cianci". For approximately one hour Mathis and Baccari discussed sale prices of the horses while Cianci stood by about ten yards away; after this discussion Cianci gave Mathis the countercheck and Mathis then left for Oklahoma. Approximately a year later Mathis and David Ashford, an employee who had traveled with Mathis to Rhode Island, were shown six or seven photographs by the Federal Bureau of Investigation. Only Mathis identified Coppola as the man who was called Cianci. Approximately two months after viewing the photographs a lineup was conducted in Oklahoma City and this time both Mathis and Ashford identified Coppola as Cianci. At trial the prosecution was allowed over appellant's objection to ask Mathis and Ashford if they had identified Coppola at the lineup. Appellant's objection was that due to the great lapse of time between the original incident in November, 1971, and the showing of photographs approximately a year later, followed by a lineup two months later, there is a possibility that misidentification has resulted. Appellant

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as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

suggests that since Mathis and Ashford were in the presence of Cianci at most one hour, since during most of that time Mathis was engaged in conversation with Baccari while Cianci stood by about ten yards away, and since this incident occurred late in the afternoon on a dark and dreary November day nearly a year before the identification took place, any identification of Coppola at the lineup probably resulted from reviewing the pictures rather than actually seeing him in Rhode Island.

We are aware that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminal suspects. Despite the hazards of initial identification by photographs, however, this procedure is still an effective tool in criminal law enforcement if the procedure followed is not so suggestive as to give rise to a substantial likelihood of misidentification. *Simmons* v. *United States,* 390 U.S. 377 (1968). As our court has noted previously, to determine whether the identification procedures were impermissibly suggestive we must look to the totality of circumstances. *United States* v. *Milano,* 443 F.2d 1022 (10th Cir. 1971), *cert. denied,* 404 U.S. 943. The record discloses that during the hour Mathis and Coppola were together Mathis had several opportunities to observe Coppola closely. Baccari introduced Coppola to Mathis upon Mathis' arrival in Providence. Mathis turned over the horses to Coppola after the agreement was consummated, and he also handed appellant the registration papers. During all of these negotiations Coppola was usually no more than ten yards away from Mathis. Approximately a year later Mathis was shown the six or seven photographs by only one FBI agent. This agent merely asked Mathis to look at the pictures and decide if he had seen any of the men before. No record of the people involved in the photographs was discussed and there was no suggestion that one picture

should be picked out over the others. It is apparent that Mathis identified Coppola from his own recollection and thus we find no impermissible suggestion in the government's use of photographs.

Appellant charges that Ashford's lineup identification was error because it resulted from viewing appellant's photograph which carried on it the inscription "Rhode Island". We reject this argument for several reasons. First, the inscription on the photograph was not likely to cause misidentification because Ashford had an excellent opportunity to observe Coppola in Rhode Island, and in all other respects the photo spread was lacking in the slightest hint of suggestibility. *United States* v. *Faulkner*, 447 F.2d 869 (9th Cir. 1971), *cert. denied*, 405 U.S. 926. Second, Ashford testified that he did not make an identification of appellant from the photograph; his identification first occurred at the lineup in Oklahoma City. Hence impermissible suggestibility does not arise in relation to Ashford.

Appellant's final argument is that he was denied effective assistance of counsel because the trial court refused to grant a continuance although counsel was employed by appellant only a few days before the trial. The facts indicate that at arraignment on November 2, 1971, appellant appeared with John Cicilline as his retained counsel. Cicilline filed numerous pre-trial motions on appellant's behalf, sat at the counsel table throughout the trial, and still continues as his counsel on appeal. Several days before the December 13, 1972, trial date appellant decided that he wanted another attorney to assist in the conduct of the trial, so Peter Zaccagnio was employed. Zaccagnio on the day of trial requested a continuance and further requested continuances throughout the trial. Appellant now asks our court to reverse his conviction because his trial counsel was not given sufficient

time to prepare for the case; thus appellant was denied effective assistance of counsel. Our court in *United States* v. *Davis*, 436 F.2d 679 (10th Cir. 1971), was confronted with the identical problem and replied by stating:

> The Sixth Amendment guaranty that the accused in a criminal proceeding shall enjoy the right to have the assistance of counsel means effective assistance, as distinguished from bad faith, sham, mere pretense or want of opportunity for conference and preparation. (At 681).

Appellant was represented by Cicilline for approximately thirty days before the trial, and as indicated, such counsel had effectively filed pre-trial motions which benefitted both appellant and newly employed counsel. The record discloses that Zaccagnio worked with Cicilline during the trial and hence we fail to find from the record any indication that appellant was denied effective assistance of counsel. On the contrary, the record discloses that appellant enjoyed the services of able counsel; he was convicted on the strength of the government's case rather than counsel's lack of preparation. *Goforth* v. *United States*, 314 F.2d 868 (10th Cir. 1963), *cert. denied*, 374 U.S. 812.

This case is AFFIRMED in all respects.

"October 25, 1973

Gentlemen:

Enclosed is a copy of the opinion of the Court in the above case. Judgment in accordance with that opinion has been entered today.

Sincerely yours,

(s) HOWARD K. PHILLIPS, *Clerk*
United States Court of Appeals,
10th Circuit"

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1170

September, 1973, Term

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
v.
RONALD COPPOLA,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(District Court No. CR-72-254)

ORDER

"On case No. 73-1170, United States v. Coppola, upon consideration whereof the petition for rehearing is denied. United States Court of Appeals, November 16, 1973."

No. 73-805

FEB 4 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

RONALD COPPOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-805

RONALD COPPOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was found guilty of having devised a scheme to defraud, in violation of 18 U.S.C. 2314. He was fined $10,000 and sentenced to a ten-year prison term. The court of appeals affirmed (Pet. App. A).

Petitioner contends that the district court's instruc-

tion to the jury constituted plain error; that there was no venue for his prosecution in Oklahoma; that it was incorrect to admit into evidence an eyewitness identification; and that the trial court erred in refusing to grant his attorney a continuance. These contentions were thoroughly discussed and properly rejected by the court of appeals, on whose opinion we rely.[1] We note in addition that the telephone communications between Rhode Island and Oklahoma which initiated the fraudulent scheme were sufficient under 18 U.S.C. 3237(a) to allow venue in Oklahoma. See *United States* v. *Spiro*, 385 F. 2d 210, 212 (C.A. 7).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[1] Petitioner presents as a question, but does not discuss, the court's failure to give an instruction concerning the government's burden of proof on the issue of identity (Pet. 2). Petitioner did not object to this omission at trial (Tr. 410-411) or even request such an instruction (Tr. 348-349). He may not raise this issue for the first time on appeal. Rule 30, Fed. R. Crim. P.

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